

EXCERPT OF MINUTES
FOR THE MEETING OF THE
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: February 18, 2004
TIME: 9:00 am
PLACE: DLNR Board Room
Kalanimoku Bldg.

**1. Modification of Designation Trigger for Waihe'e Aquifer System Area (60103) as
a Ground Water Management Area, Wailuku, Maui**

Mr. Roy Hardy, Regulation Branch Chief, distributed a PowerPoint presentation handout. Trigger number 4 concerning the water levels at Kanoa Test Hole was discussed. New information has led to the following conclusions: 1) Assumptions of original Kanoa Test Hole trigger no longer valid. 2) Estimated 150-200 ft. clearance from bottom of wells to the mid-point. 3) Chlorides are very low and stable. 4) Pumping condition water levels could take decades to cause undesirable impacts, and 5) Preliminary analysis shows a recharge boundary near North Waihe'e Wells, which could be Waihe'e Stream or something else.

Commissioner Whalen asked when the decision was made in November 2002, what was the estimated clearance between the bottom of the wells and the transition zone? Mr. Hardy showed through the use of graphs in the presentation that the clearance for different wells would vary, but generally it would be approximately 50 ft. greater (200-250 ft.)

RECOMMENDATION:

Given the timescale of ground-water behavior, the best verified information to date, and the desire for current hydrologic projects to come to fruition, staff recommends:

1. That the Commission rescind the Kanoa Test Hole trigger.
2. Defer designation of the Waihe'e Aquifer System (60103) area.
3. Direct staff to pursue a MOA with MDWS that:
 - a. Limits pumpage from existing MDWS wells in Waihe'e to 4.5 mgd; and
 - b. Ensures timely completion of the West Maui ground water numerical model and Waihe'e deep monitor well.
4. Direct staff to provide the Commission with a semi-annual status report on:
 - a. The MOA with MDWS; and
 - b. Waihe'e Aquifer System area hydrologic conditions.

Chairman Young asked for clarification, that the implication is that staff does not believe that the aquifers are at risk at this time? Staff said, strictly based on current hydrologic conditions, the evidence does not reflect any danger at this particular point in time. Chairman Young stated that based on the data we know now, the Kanoa Test Hole water level was at the automatic trigger level at the time of the decision. The Commission thought at the time that the water level was higher than it actually was. Staff stated that the lower water level probably preceded the decision

for a long time and that the current trend is that the aquifer is stable. Chairman Young stated that the Commission has an emergency capability, and by deferring the designation, it can still act within normal procedure, to either call for a special meeting or regular monthly meeting, if there is a problem. Staff said that we would come back to the Commission semi-annually with a report.

Commissioner Whalen asked staff how many inches or feet did the water level have to drop for action to seem necessary, and Mr. Hardy replied a foot. Commissioner Frazier asked if the report could be quarterly instead of semi-annually. It was stated by staff that a semi-annual report would be sufficient however; we could do it quarterly if the Commission desires, and would come before the Commission any time conditions called for it.

Chairman Young confirmed the recommendation to defer designation but leave the process open so that if we pursue designation we don't have to start from zero. There is no actual trigger, it is a monitoring, management process instead.

For the record, Deputy Director Ernest Lau named the organizations that submitted testimonies via email. Those testimonies recommending designation were from Kat Brady, Life of the Land; Isaac Harp, Lahaina, Maui; Clyde Namu'o, The Office of Hawaiian Affairs; and Joe Lander, Na'alehu, Hawai'i.

Testimony was given in person by Kapua Sproat, attorney from Earthjustice. Ms. Sproat referred back to the November 2002 Water Commission Meeting whereby the Commission denied Maui Meadows petition to designate the Iao-Waihe'e Aquifers and where triggers for automatic designation were established. Earthjustice on behalf of Maui Meadows lodged a formal objection to Commissioner Ching's participation in this matter. At the time they were informed by then Chairperson, Gilbert S. Coloma-Agaran, that Commissioner Ching had submitted a letter and had recused herself from the matter. It was Earthjustice's understanding that Ching will be participating today, so for the record, Ms. Sproat renewed the objection to Ching's participation in this matter. Chairman Young stated that in prior Commission meetings this objection was not raised. Ms. Sproat stated that this objection was raised in November 2002 and submitted as part of the written testimony for the record. They were informed at that time that Commissioner Ching would not be participating. It was brought to Earthjustice's attention at the last Commission meeting in January 2004 that Commissioner Ching did participate in voting and that is why they are renewing their objection. Ms. Sproat formally lodged her objection to Commissioner Ching's participation in this matter.

It was Ms. Sproat's understanding that Commissioner Ching is Vice President of Government and Community Relations for Alexander and Baldwin. Ching's employer both owns wells and uses water from the Iao-Waihe'e Aquifer Systems. It was also Ms. Sproat's understanding that A & B is one of the private partners in the Central Maui Joint Venture and that they continue to maintain contractual relations with the County of Maui DWS regarding water sources in both Iao and Waihe'e. Because the Commission has the authority today to affect the interest of Commissioner Ching's employer, Ms. Sproat objected to her participation because it creates both a conflict of interest and the appearance of impropriety.

For the record, Commissioner Ching stated that she did recuse herself from the November 2002 and asked advice from legal counsel because her employer A & B does have wells in the Iao Aquifer not in the Waihe'e Aquifer. Although Commissioner Ching was advised that it would not cause a conflict, she decided to recuse herself from the Iao action. The action happened to include both the Iao and Waihe'e Aquifers. Because we are now just considering the Waihe'e Aquifer, and the company does not have any wells in Waihe'e Aquifer, she did not feel there was a need to recuse herself from the action that is currently before us.

Attorney General Yvonne Izu spoke to Commissioner Ching beforehand and considered all the concerns that were raised and stated there was no conflict and advised her that she could participate.

Ms. Sproat stated that although A & B doesn't own wells in the Waihe'e Aquifer it was her understanding that they continue to use water from that aquifer and that they were partners in the Central Maui Joint Venture and continue to maintain relations with the County of Maui DWS. For the record she lodged her objection. Chairman Young stated for the record that the Attorney General indicated that Commissioner Ching could participate.

Ms. Sproat urged the Commission to comply with the automatic trigger for designation that was established in November 2002 and to immediately designate the Waihe'e Aquifer as a ground water management area.

Ms. Sproat's written testimony on Agenda Item F1 is also available.

A written statement by William Meyers, former USGS District Chief, is also attached for reference.

Ms. Sproat summarized her testimony saying the Waihe'e Aquifer continues to be threatened by both existing and proposed withdrawals of water, therefore, she opposed any action to remove automatic designation. As detailed in Earthjustice's testimony in October 2003, January 2004 and today, the course of action that was needed by the resource and required by the law is automatic designation.

Chairman Young wanted clarification with the Attorney General about making changes and decisions, is it quasi-judicial proceedings? Chairman Young asked if this proceeding is quasi-judicial or quasi-legislative? Attorney General Yvonne Izu stated that it was quasi-legislative, referring back to the Koolau Ag decision and the Supreme Court.

Chairman Young stated that based on what we know now as opposed to what was known in November 2002 the Commission would not have made that type of trigger designation because it would have been an ineffective trigger because it was already self-fulfilled. They continued on because the expectation was it was not a self-fulfilled trigger. He asked, "shouldn't we deal with what we know today rather than deal with what has proved to be false information and what would have been an ineffective trigger from November 2002?"

Ms. Sproat stated that even if the aquifers were designated today, it would only start the process. After that, the Maui residents would have up until a year to file water use permits. Once those applications are filed, the Commission will have to process them, and that can take anywhere from 6 months to years to complete. The reason Earthjustice was urging for designation now is that it will only start the process, it will take several years before the Commission actually has the tools to manage the aquifer. Even though it's the Commission's responsibility under the Water Code and the Constitution to protect the resource and actively manage water resources, the Commission doesn't have the tools to manage water use absent designation. There is really no downside to designation, it provides more information to the Commission and it starts the process earlier, and in addition it is required by law.

Dr. Jim Anthony, who works for an environmental group that monitors water issues statewide, mentioned that his group put \$100,000 into the Waiahole Case, which they take seriously as now the law, particularly with respect to the precautionary principle and the public trust doctrine. For the record, Dr. Anthony stated that Commissioner Ching does have a conflict of interest. It also has had new life breathed into it in the recent decision written by Judge Levinson in the Supreme Court Case involving Wai'ola O Moloka'i. In that case he re-invokes the Commission's obligation to honor the precautionary principle that says if you're in doubt, either don't do it or do it in order to protect the resource. The Commission has an obligation to protect this resource and the Commission can better protect it if we designate now. There is no loss to the Board of Water Supply and whatever water it may apply for to service the people, and the conditions under which it will be able to take water will be more carefully managed and nurtured.

Dr. Anthony also referred to William Meyer's written statement saying that it rebuts the technical bases that staff member Mr. Roy Hardy presented earlier. Dr. Anthony stated that the technical bases of the arguments that have been made by staff are found to be defective and for that reason the Commission should consider designation at this time and not defer it until later. The prudent, sensible, and legally correct thing to do in keeping with the Commission's responsibilities particularly the public trust doctrine and the precautionary principle is to vote for designation now.

A question was raised whether the agreement with the Maui Board of Water Supply is appropriately set at 4.5 mgd rather than 4 mgd. Chairman Young asked if there was any comment on that and staff answered by saying there is merit by keeping it at 4 mgd however, there is an alternative source that isn't being used right now, the Kupa'a Well. Staff feels that it is premature at this time to relate infrastructure sustainable yields to aquifer wide sustainable yields. Staff would feel more comfortable at 4 mgd but there has also been another user in the area that has been pumping. So far the track record shows the total pumping is above 4.5 mgd and things seems to be stable over the course of several years. Chairman Young stated an issue raised on the precautionary principle, he asked if staff recommendation is taking an aggressive or precautionary approach? Staff believed this is still precautionary.

Commissioner Frazier asked if the Kupa'a Well comes on does something else goes off? Staff said that it will definitely have an impact and change. That will not happen soon, so there is time to weigh that.

Deputy Director Jeff Pearson from the Maui DWS stated that Deputy Lau has discussed the MOA with Mr. George Tengan and himself. The department feels that they can meet the 4.5 mgd based on the 12-month moving average. At times, during the dry periods, and not knowing the estimated growth of Maui County and the Central Maui area, it might be difficult to meet the demand if both aquifers, Iao and Waihe'e were held at 18 and 4.5 mgd respectively, at the same time. MDWS is working on obtaining additional surface water use and sources. DWS serves the community and provides clean water to the community. DWS is not out to damage the aquifer to raise chlorides or to overpump Iao or Waihe'e. The MDWS intent is to provide good water and maintain the sustainability aquifers. MDWS will try to meet that 4.5 mgd based on a 12-month moving average.

Commissioner Frazier mentioned the need for growth and asked if there were resources like in Waikapu and other places that could be tied in with growth as opposed to taxing these particular aquifers. Deputy Pearson stated that the Waikapu Aquifer has a 1 mgd sustainable yield and they are working on another well in Waikapu. They are also working on surface water issues and upgrading and increasing the flows at the Iao Treatment Plant. If everything goes as planned the expansion should be completed before the end of 2004.

AMENDED RECOMMENDATION:

1. Rescind all triggers;
2. Limit MDWS Waihe'e pumpage to 4.0 mgd based on a 12 month moving average.

MOTION: (Frazier/Whalen)

To approve as amended.

UNANIMOUSLY APPROVED